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No. 95-129

**In The
Supreme Court of the United States**

October Term, 1995

EXXON COMPANY, U.S.A.;
EXXON SHIPPING COMPANY,

Petitioners,

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;
HAWAIIAN INDEPENDENT REFINERY, INC.;
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

Respondents,

v.

GRIFFIN WOODHOUSE, LTD.;
BRIDON FIBRES AND PLASTICS, LTD.,

Third-Party Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. After this Court decided *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker when defendants conceded that their breaches of maritime duties imposing strict liability in tort and negligence were causes-in-fact of the vessel's stranding because the court found that the tanker's captain was grossly negligent in navigating the imperiled vessel?

2. After this Court decided *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) may an admiralty court exonerate defendants from liability to a shipowner for the loss of its tanker after defendants conceded that their breaches of express and implied warranties were causes-in-fact of the vessel's stranding because the tanker captain was grossly negligent in navigating the imperiled vessel?

PARTIES

The parties are Petitioners/Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A., a division of Exxon Corporation, Respondents/Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. and Sofec, Inc., and Respondents/Third-Party Respondents Bridon Fibres And Plastics, Ltd. and Griffin Woodhouse, Ltd. Werth Engineering & Marine, Inc., initially a third-party respondent, was dismissed before trial by stipulation of the parties.¹

¹ Pursuant to Rule 29.1, Petitioners state that the non-wholly owned subsidiaries and affiliates that have issued public shares in Petitioners are as follows: Sea River Maritime, Inc., successor in interest to Exxon Shipping Company, Compania Minera Disputada de las Condes S.A.; Esso Malaysia Berhad; Esso Societe Anonyme Francaise; General Sekiyu, K.K.; Imperial Oil Limited; Les Docks des Petroles d'Ambes; Societe Francaise Exxon Chemical; Tonen Kabushiki Kaisha.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINION	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. Procedural History of the Litigation in the District Court	2
B. Summary of the Evidence	9
SUMMARY OF THE ARGUMENT	19
ARGUMENT	23
I. THE APPLICATION OF COMMON-LAW SUPERSEDING CAUSE TO RELIEVE RESPONDENTS FROM ALL LIABILITY IN TORT FOR THEIR WRONGDOING IS IRRECONCILABLE WITH RELIABLE TRANSFER	23
A. The Decision Below Violated the Admiralty Policies Established by <i>Reliable Transfer</i>	26
B. The Decision Below Violated <i>Reliable Transfer's</i> Requirement that all of Defendants' Faults Must Be Compared with the Plaintiffs' Faults in Assigning Responsibility for a Marine Casualty	27
C. Respondents could not Escape Liability even if Superseding Cause had been Incorporated into General Admiralty Law	29

TABLE OF CONTENTS - Continued

	Page
D. The District Court's Foreclosing Exxon from Ever Proving its Case-in-Chief Deprived it of Due Process of Law.....	33
II. THE NINTH CIRCUIT'S EXONERATION OF RESPONDENTS FROM ALL LIABILITY FOR BREACHES OF EXPRESS AND IMPLIED ADMIRALTY WARRANTIES IS CONTRARY TO ADMIRALTY POLICY ESTABLISHED BY <i>ITALIA SOCIETA</i>	34
A. The Ninth Circuit Opinion is Irreconcilable with <i>Italia Societa</i>	34
B. The Ninth Circuit's Opinion is Contrary to Other Circuits.....	36
CONCLUSION	38

TABLE OF AUTHORITIES

	Page
CASES	
<i>City of Milwaukee v. Cement Div. Nat'l Gypsum Co.</i> , 515 U.S. ___, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995)	19, 24, 25
<i>Donaghey v. Ocean Drilling & Exploration Co.</i> , 974 F.2d 646 (5th Cir. 1992).....	18
<i>Eastern Massachusetts Street Ry. Co. v. Transmarine Corp.</i> , 42 F.2d 58 (1st Cir.), cert. denied, 282 U.S. 883 (1930).....	36
<i>Employers Ins. of Wausau v. Suwanne River Spa Lines, Inc.</i> , 866 F.2d 752, (5th Cir.), cert. denied sub. nom. <i>Employers Ins. of Wausau v. Avondale Shipyards</i> , 493 U.S. 820 (1989).....	32
<i>Exxon Shipping Co. v. Sofec, Inc.</i> , 54 F.3d 570 (9th Cir. 1995)	1
<i>Gasoline Products Co., Inc. v. Champlin Refining Co.</i> , 283 U.S. 494, 51 S. Ct. 513, 75 L.Ed. 1188 (1931)	19, 21, 33
<i>Hahn v. United States</i> , 535 F. Supp. 132 (D.S.D. 1982).....	5
<i>Hercules, Inc. v. Stevens Shipping Co.</i> , 765 F.2d 1069 (11th Cir. 1985).....	17, 18, 28, 29
<i>Hunley v. ACE Maritime Corp.</i> , 927 F.2d 493 (9th Cir. 1991)	18
<i>International Ore & Fertilizer Corp. v. S.G.S. Control Servs. Inc.</i> , 38 F.3d 1279 (2d Cir. 1994)	36
<i>Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company</i> , 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964).....	passim

TABLE OF AUTHORITIES - Continued

Page

<i>Kermarec v. Compagnie Generale Transatlantique</i> , 358 U.S. 625, 79 S. Ct. 406, 3 L.Ed.2d 550 (1959)	23
<i>Lone Star Indus., Inc. v. Mays Towing Co., Inc.</i> , 927 F.2d 1453 (8th Cir. 1991)	18
<i>McDermott, Inc. v. AmClyde</i> , 511 U.S. ____ 114 S. Ct. 1461, 128 L.Ed.2d 148 (1994)	24
<i>Paragon Oil Co. v. Republic Tankers, S.A.</i> , 310 F.2d 169 (2d Cir. 1962), cert. denied sub. nom. <i>Yacimientos Petroliferos Fiscales v. Paragon Oil Co.</i> , 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963)	22, 36
<i>Petition of Kinsman Transit Co.</i> , 338 F.2d 708 (2d Cir. 1964), cert. denied sub. nom. <i>Continental Grain Co. v. City of Buffalo</i> , 380 U.S. 944 (1965)	20, 30, 31
<i>Smith v. Sperling</i> , 354 U.S. 91, 77 S. Ct. 1112, 1 L.Ed.2d 1205 (1957)	33
<i>The Gulfstar</i> , 136 F.2d 461 (3d Cir. 1943)	32
<i>The Imoan</i> , 67 F.2d 603 (2d Cir. 1933)	32
<i>The Louisiana</i> , 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866)	16
<i>The Max Morris</i> , 137 U.S. 1, 11 S. Ct. 29, 34 L.Ed. 586 (1890)	21, 32
<i>The Pennsylvania</i> , 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874)	16
<i>United States v. Reliable Transfer Co., Inc.</i> , 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975)	passim
<i>Watz v. Zapata Off-Shore Co.</i> , 431 F.2d 100 (5th Cir. 1970)	31

TABLE OF AUTHORITIES - Continued

Page

CONSTITUTIONS

U.S. Const. amend V	1
---------------------------	---

STATUTES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1333	1
28 U.S.C. § 1346(b)	5
33 C.F.R. § 164.11(c)	16

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 54(b)	2
G. Gilmore, C. Black, <i>The Law of Admiralty</i> (2d ed. 1995) § 7-5	23
<i>Restatement (Second) of Contracts</i> (1981) § 350	22, 36
<i>Restatement (Second) of Torts</i> (1965) § 442B	20, 29, 30

OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Exxon Shipping Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). A copy of the Slip Opinion is annexed to the certiorari petition as Appendix A ("CP App. A"), and it is reprinted in the Joint Appendix ("JA") at 209, *et seq.*

JURISDICTION

The opinion of the court of appeals was filed on April 26, 1995. A timely petition for rehearing was denied by order filed May 24, 1995; a copy of the order is annexed to the certiorari petition as Appendix B ("CP App. B"). The district court's jurisdiction was in admiralty, pursuant to 28 U.S.C. § 1333. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). Petitioners' Petition for Writ of Certiorari was filed in the Supreme Court on July 24, 1995 (Supreme Court Case No. 95-129). This Court's order granting certiorari was issued on November 22, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law. . . ."

Section 1333 of 28 U.S.C. provides, in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of

admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Petitioners (plaintiffs/appellants below) Exxon Shipping Company ("ESC") and Exxon Company, U.S.A. (collectively, "Exxon") filed their certiorari petition on July 24, 1995 seeking review of the judgment entered on March 31, 1994 of the Ninth Circuit affirming a final judgment of the United States District Court for the District of Hawaii, pursuant to Federal Rules of Civil Procedure, Rule 54(b) upon less than all claims and as to less than all parties, against Exxon and in favor of Respondents (respondents/defendants and third-party defendants below): Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. (related corporations, collectively "HIRI" or "HIRI respondents"), and Sofec, Inc. ("Sofec"), Bridon Fibres and Plastics, Ltd. ("Bridon"), Griffin Woodhouse, Inc. ("Griffin") in Exxon's action in admiralty seeking damages for the loss of ESC's tanker, the EXXON HOUSTON.

STATEMENT OF THE CASE

A. Procedural History of the Litigation in the District Court

Exxon filed its complaint in admiralty in April, 1990 alleging that the HIRI respondents breached their express and implied warranties of safe berth, their implied warranty of workmanlike performance with respect to stevedore and terminal operations, and their admiralty duties

imposing liability for negligence and strict product liability causing ESC's constructive total loss of the EXXON HOUSTON ("HOUSTON") and other damages, including the cost of cleaning up oil spills and loss of cargo. (JA 29-41.) Against Sofec, Exxon alleged negligence in the manufacture and sale of the Single Point Mooring System ("SPM"), strict product liability, and breach of the implied warranty of merchantability and fitness for purpose. (JA 41-45.) HIRI and Sofec denied liability and asserted affirmative defenses. (CR 8, 11.)²

HIRI filed a third-party complaint against Bridon, Griffin, and Werth Engineering & Marine, Inc., invoking diversity jurisdiction and seeking contribution and indemnity with respect to Exxon's claims on the theory that the third-party defendants had manufactured and supplied the chafe chain that had parted. (CR 13.)³ Bridon and Griffin filed answers to the third-party complaint and to Exxon's complaint denying liability and asserting affirmative defenses. (CR 30, 33, 55, 138.)

Pretrial Orders. On June 3, 1992, Griffin filed a motion to bifurcate the liability issues or to continue the trial date to permit further discovery. (JA 48.) The other respondents joined in Griffin's bifurcation motion. (CR

² Throughout this brief "CR" refers to the Clerk's Record; "ER" refers to the Excerpts of Record filed in the Ninth Circuit; "JA" refers to the Joint Appendix filed herewith; and "CP App." refers to the Appendix annexed to the certiorari petition heretofore filed.

³ Werth was dismissed without prejudice by stipulation of the parties. (CR 165.)

370, 373, 375.) Respondents persuaded the court that the case could be tried as if it were a simple negligence case; they argued that the court would save its own time and themselves money if the court first tried the conduct of the HOUSTON's Captain after HIRI's mooring equipment had failed and the tanker was cast adrift burdened by the broken 840-foot cargo hose bolted to her manifold (the "breakout"). They contended that if the court found that the Captain was negligent in navigating the tanker, it could also find that his negligence was a superseding cause of the loss of the tanker, and the whole case could go away. (7/27/92 RT 6.)⁴ To convince the court to try the case upside-down and backwards, respondents conceded that their collective conduct was a cause-in-fact of the stranding ("but for the breakout there wouldn't have been the grounding in this case . . ."). (7/27/92 RT 31.)

Exxon vigorously opposed the motion, arguing that trying the Captain's conduct before Exxon was permitted to put on its case-in-chief would distort causation and disable the court from making the determination of comparative fault required by *Reliable Transfer, Inc.* (JA 51-57, 7/27/92 RT 24.) The district court granted respondents' bifurcation motion on July 31, 1992. (JA 58-75.) Its order stated that "the first phase of the trial will be limited to the issue of causation with respect to . . . [the] HOUSTON's grounding, but not including the issue of

⁴ The district judge announced at the threshold of the case that he was unfamiliar with the aspects of admiralty law of this case and that his law clerk would help him because his clerk had served in the United States Navy. (2/11/93 RT 213-14; 3/3/93 RT 127-28.)

causation with respect to the breakout itself." (JA 74; ER 46.)⁵ Before testimony was taken, the district court explained that Phase I was designed to permit the court to decide whether the Captain's conduct was so negligent as to become "an overriding" cause of the stranding. The court added: "[Y]ou are going to really confine it to those few minutes - as he gets out toward the last few minutes before the grounding." (2/9/93 RT 50.)⁶

After some further procedural skirmishing, Exxon filed a motion for partial summary judgment against the HIRI respondents in August, 1992 because they breached their express and implied warranties of safe berth when the chafe chain failed. (CR 433, ER 49-50.) The court denied the motion holding that chain failure was a Phase II issue. (CR 538; JA 109.) After the final pre-trial conference on October 9, 1992, the court ruled that PRI International was bound by its express warranty of safe berth, but it declined then to decide whether the other HIRI respondents were also bound by the same warranty. It also expressly declined to decide "whether HIRI is bound

⁵ Exxon moved the court to clarify the bifurcation order. (CR 462, ER 73; CR 463, ER 95; CR 473, ER 97-98; CR 482, ER 100-102; CR 485, ER 104.) The court denied the motion. (CR 502, ER 106.)

⁶ The court adhered to its interpretation of legal cause throughout the trial: "As stated in the court's July 31, 1992 bifurcation order, in order to prove that the breakout was a proximate cause, 'Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of grounding.' *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982)." Conclusions of Law 8, JA 162. [*Hahn* was a wrongful death action invoking the Federal Tort Claims Act, 28 U.S.C. § 1346(b).]

by the warranty of safe berth, whether the parting of the chafe chain constituted a breach of warranty of safe berth, the scope of the warrantor[s'] or *charterer's* legal obligations pursuant to the warranty of safe berth" because "[t]hese issues . . . need not be resolved in order for the litigants to prepare for the first phase of the bifurcated trial. . . ." [Emphasis added.]⁷ (CR 538; ER 132; JA 112-113, n.4.)

The court's October 9, 1992 order prompted Exxon to seek a Rule 16 conference to clarify the evidentiary constraints. Exxon sought to ascertain whether it could introduce its evidence that the HIRI respondents' own expert had warned them that a breakout was inevitable and that Gall Thompson breakaway couplings (quick release safety devices) on the cargo hoses were essential. Exxon pointed out that the removal of the safety devices with which the cargo hoses had been initially equipped and the failure of the HIRI respondents to replace them with Gall Thompson couplings caused the cargo hose to impair severely the navigability of the tanker and was a critical factor in Captain Coyne's decision to order a final turn. The court ruled that the proffered evidence was not admissible in Phase I. (12/8/92 RT 36, ER 159; CR 548.)⁸

⁷ Although the Findings of Fact and Conclusions of Law refer to HIRI as a "charterer," HIRI did not charter the HOUSTON.

⁸ The district court later ruled at trial that the HOUSTON's Captain could not testify about the effect on the navigability of the tanker after the breakout caused by the lack of breakaway couplings on the cargo hoses. (2/11/93 RT 195.)

Exxon's Offer of Proof. When all efforts to change the court's mind about bifurcation failed, Exxon offered to prove that the HIRI respondents knew that the berth was unsafe before the HOUSTON sailed to Hawaii. Before the HOUSTON incident, two different tankers had broken away from the SPM. The HIRI respondents had been repeatedly advised by their own experts that breakaways were inevitable; they nevertheless had removed the quick release couplings with which the cargo hoses had been initially equipped, and they failed to replace them after their own experts advised them the hoses were dangerously unsafe without such releasing devices; HIRI had also been advised that the mooring was unsafe unless particular additional safety measures were taken. The HIRI respondents ignored all the warnings, installed none of the safety devices and took none of the other recommended safety measures. (2/9/93 RT 61-64, CR 544 at 4-5; ER 143-44; 12/8/92 RT 8, 22-23, 34-35, ER 157-58.)⁹

Exxon also offered to prove that Sofec had failed to order the proper chafe chain, failed to test it, and failed to provide adequate instructions regarding operating parameters. As against Bridon and Griffin, Exxon offered to prove that those respondents had either manufactured or supplied the defective chafe chain which had been poorly designed and inadequately tested. (2/9/93 RT 61-64.)

Trial. Adhering to its prior bifurcation order, the district court foreclosed Exxon from introducing any of its

⁹ After the HOUSTON stranded, the Coast Guard compelled HIRI to take almost all of the safety measures they had previously ignored. (Findings 90-91, JA 160-161.)

abundant evidence of the respondents' pre-breakout breaches of warranty and torts that created the stranding hazard to which the HOUSTON ultimately succumbed. The court excluded as irrelevant the decision of the Administrative Law Judge to the Department of Transportation that had exonerated Captain Coyne from charges of negligence in the HOUSTON's stranding. (2/9/93 RT at 40-42.)¹⁰

When Phase I concluded, the court issued its Findings of Fact and Conclusions of Law holding that Captain Coyne's navigation of the stricken HOUSTON was extraordinarily negligent and that his negligence after the breakaway was the "sole" and superseding cause of the tanker's loss. (Conclusions of Law ("Conclusions") 44-45, JA 173-175.) The district court thereafter entered partial judgment for respondents based entirely upon these Findings of Fact and Conclusions. (JA 200-203, 205.) Phase II was never tried.

Post-Trial Proceedings. Exxon's first notice of appeal was dismissed for lack of a final appealable judgment or order. (CR 661.) Upon remand, Bridon, joined by the other respondents, moved to enter a final judgment upon all of Exxon's claims for damages caused by the grounding of the HOUSTON. (CR 662, 663-65.) Exxon then moved for entry of a final judgment limited to the claim for relief based on negligence to ripen its appeal to the Ninth Circuit. (CR 667.) In response to Bridon's motion

¹⁰ The Administrative Law Judge's opinion is reproduced in full at ER 293 *et seq.* The opinion was not offered for issue preclusion because respondents were not parties to the Coast Guard proceedings. (2/19/93 RT 27.)

that judgment should be entered in favor of respondents on all of Exxon's claims for loss of the vessel (3/14/94 RT 17), Exxon objected because it had been precluded from introducing any of its evidence with respect to breaches of express and implied warranties. Exxon pointed out that respondents' defense to claims founded on tort did not apply to contractual claims. (3/14/94 RT 12-13.) The court granted Bridon's motion stating that it was thereby sending to the Ninth Circuit the question whether its judgment at the end of Phase I completely decided all of Exxon's theories for recovering for the loss of the tanker. (3/14/94 RT 19-20; CR 674.)

Judgment was entered on April 20, 1994 (CR 676), and Exxon's appeal to the Ninth Circuit was filed on April 25, 1994. (CR 677.)

B. Summary of the Evidence

The HOUSTON was owned and operated by Exxon Shipping Company, the vessels of which carried crude oil for Exxon Company, U.S.A. All of the HIRI respondents are affiliated corporations operating the SPM and the refinery at Barbers Point, Oahu. Sofec manufactured the SPM; Griffin manufactured the chafe chain that parted; and Bridon distributed the chain. (Findings 1-5, JA 141-142.)

This maritime drama began benignly in 1988 when Exxon and HIRI entered negotiations whereby HIRI would buy crude oil from Exxon for HIRI's refinery in Oahu. The negotiations resulted in a written contract to deliver the crude to HIRI at one or more moorings to be designated by it. For the cargo to be delivered the HIRI

named its SPM as the delivery point. The SPM was one and a half miles from HIRI's refinery which is located on Oahu's coastline. (Findings 7-11, JA 143.) Title to the crude oil was to pass to HIRI when the crude flowed into HIRI's cargo hoses. (CR 624.) The contract of sale included a specifically negotiated safe berth warranty in Exxon's favor.¹¹

The HOUSTON was a single screw, steam-propelled oil tanker, weighing 72,056 dead weight tons. She was 766.9 feet long with horsepower of 19,000 ahead and approximately 6,000 astern. (Findings 12, JA at 143.) Captain Kevin Coyne was Master of the tanker.¹² There were four other deck officers (Findings 18, JA 144-145); the remaining deck complement consisted of six able-bodied seamen. (Ex. 29, offered and received 2/9/93 RT 34-35; 2/9/93 RT 9; 2/10/93 RT 45; 2/17/93 RT 214; 2/18/93 RT 103.)¹³

¹¹ "The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed." (Findings 8; JA 142-143.)

¹² At the request of his children, Captain Kevin Dick changed his surname to Coyne shortly before this action was tried. (Findings 14, JA 144; 2/9/93 RT 131.)

¹³ The HOUSTON also had aboard a full complement of engineers and stewards; their activities are not implicated in the litigation.

Captain Steven Marvin was employed by HIRI as mooring master. He boarded the tanker on March 2, 1989 and remained aboard her at all relevant times thereafter. (Findings 21, JA 145.)¹⁴ On March 2, 1989, while the tanker was discharging oil into HIRI's cargo hoses, a heavy storm arrived and with it high waves and severe ocean currents moving toward shore. (Findings 25, JA 146.) After the HOUSTON had discharged all but 90,000 barrels of crude oil, the chafe chain that had secured the tanker to SPM's buoy broke causing the tanker to be set adrift while she was still tethered to the two cargo hoses bolted to her manifold. (Findings 23-25, JA 146; 2/10/93 RT 24; 2/17/93 RT 205.) The HOUSTON's crew promptly stopped the further flow of crude oil into the cargo hoses, thereby limiting the spill to the crude in the cargo hoses themselves.

Although the cargo hoses had originally been equipped with "camlocks," quick-disconnect devices to clear the hoses from tankers when the SPM failed (Ex. 322 at ER 11628 [offered], 2/25/93 RT 170 [received], ER 285; 2/9/93 RT 29; 2/11/93 RT 66; 2/11/93 RT 176), the HIRI respondents had removed the camlocks and replaced them with 12 heavy bolts on each hose to connect the hoses to ships' manifolds. (Findings 23, JA 146.) The Captain was unable to keep the tanker close to the SPM, and the drifting tanker put tension on the cargo hoses. (Findings 25-26, JA 146-147.) At 1725, the first cargo hose parted a few feet below the water line; at 1728, the second

¹⁴ Captain Marvin had no experience aboard commercial tankers as a master or a first mate. (Findings 22, JA 145.)

cargo hose broke away from the buoy bringing with it the heavy metal spool piece that had secured the hose to the SPM (the "breakout"). (Findings 25-28, JA 146-147.) The HIRI respondents had been warned by their experts of that danger. (ER 123, 124; 12/8/92 RT 22.)

"Obviously, the breakout was a cause in fact of the stranding, *i.e.*, had the mooring chain not parted, the . . . HOUSTON would not have stranded." (Conclusions 7, JA 162.) From the time of the breakout until minutes before the tanker stranded, the vessel was crippled by 840 feet of the trailing cargo hose that, together with the spool piece, weighed 1700 pounds. (Findings 28, JA 147; 2/12/93 RT 13.) The hoses had been designed to float, but the spool piece caused a hundred feet of the hose to sink while the remainder was partially floating and partially submerged. (Findings 27-28, JA 147.) The hose repeatedly began moving under the tanker threatening to entangle her propeller or rudder; if either event had happened, the vessel would have been helpless. (2/10/93 at 87; 2/10/93 RT 33.) Because that danger would have increased if the tanker had been navigated ahead (2/10/93 RT 49, 63), Captain Coyne ordered the tanker to back; she was not designed to transit by backing and that maneuver was ponderously slow and difficult. (2/10/93 RT 89; 2/10/93 RT 38; 2/11/93 RT 114; 2/11/93 RT 165; 2/25/93 RT 117.)

The HIRI respondents knew that they had no tugs powerful enough to help tankers when the SPM failed and that it would take four to six hours to get such assistance from others. (2/12/93 RT 229; 2/9/93 RT 61-62, CR 532, ER 123-25.) HIRI had only one small tug available, the NENE, which did not have enough power to

push or pull a tanker set adrift. (2/11/93 RT 135, 226.) The NENE's crew was able to secure a line to the second cargo hose to try to keep it from drifting under the tanker. (Findings 43, JA 150.) Until that trailing hose could be successfully unbolted from the tanker and towed far enough away from the tanker to avoid restricting her navigability, it posed a continuing danger to the HOUSTON, the NENE, and the crews of both vessels. (2/10/93 RT 38, 49, 63; 2/11/93 RT 137.)

Captain Coyne tried unsuccessfully to anchor the vessel. (Findings 35, 38, JA 148-149.) He thereafter continued to back the tanker away from the shoreline and then caused her to make a lee to minimize the movements of the hose while the bolts on the cargo hose were being detached from the manifold. (2/10/93 RT 48-49, 51, 55, 58, 63-64, 67, 72-73.) Removal of the bolts consumed more than an hour. (Findings 64, JA 156.)

At 1927, while the cargo hose was suspended from the ship's starboard crane to hold it away from the ship and before the crane could lower the hose into the sea, efforts to synchronize the movements of the NENE with the tanker failed in the storm and darkness. (2/10/93 RT 111.) Captain Coyne blew the tanker's whistle to get the NENE's attention because he was unable to reach her by radio. (2/10/93 RT 112.) The HOUSTON's chief mate heard the signal and saw that the hose was dangerously close to the tanker's propeller and rudder (2/10/93 RT 202); he saw the NENE begin to pull the hose away, and he saw that the movement of the hose was putting tension on the tanker's crane. (2/18/93 RT 8-9.) The mooring master yelled at the NENE through his radio to stop before it pulled the ship's crane down. (2/17/93 RT 37.)

Efforts to reduce the strain on the crane failed. (2/12/93 RT 42, 113; ER 326-27.) The stress caused the crane's collapse and threw the crane operator to the cage railing of the operator's platform. (Findings 64-66, JA 156.) The boom of the collapsed crane began sweeping the tanker's deck, threatening the lives of the deck crew and creating the danger of its striking the ship's manifold which could cause a disastrous explosion. (2/18/93 RT 25-26.) The deck crew worked feverishly to restrain the swinging boom, but before it could be fully secured, the tanker stranded at 2009. (Findings 83, JA 159; 2/18/83 RT 99.)

When the crane collapsed, Captain Coyne ordered his second mate, the first responder for medical casualties, to leave the bridge to evaluate the crane operator's condition. (2/10/93 RT 116.) The second mate reported that the crane operator appeared to be going into deep shock from serious injuries. (Findings 72, JA 157; 2/10/93 RT 119, 122, 124.) Because the Captain had more medical training than his second mate, he decided that he should try to navigate the tanker as quickly as practicable to the safety of the deep seas where he could leave the bridge to examine the crane operator himself.¹⁵ (Findings 73, JA 157.)

¹⁵ The court of appeals' opinion states that "[b]y 1803, the small assist vessel NENE was able . . . to get control of the end of the second hose so that it was no longer a threat to the larger ship." (JA 216.) As Exxon pointed out in its petition for rehearing, the statement was contradicted by the record. The opinion itself later recognized that the cargo hose had caused the port crane to collapse at approximately 1947. (JA 217.)

The opinion also stated that the crane operator "was in fact not seriously injured" (JA 233), despite the court's recognition that the crane operator was reported to be in shock (*Id.* at 217). Although it later turned out that the operator was not as

By 1956, the NENE had begun to tow the hose away from the HOUSTON, but the location of the hose could not be ascertained from the tanker either by radar or by sight. (2/10/93 RT 124; 2/11/93 RT 44; 2/25/93 RT 129.) The Captain knew that the NENE was hauling the hose from the HOUSTON's port side, and he decided to turn to port. (2/10/93 RT 124.) The Captain ordered the tanker to make a forward starboard turn at 1956 when she was one mile from the shoreline. (Findings 47, JA 153, 157; 2/11/93 RT 41.) If he had ordered her again to back, it would have taken an hour to move her another mile from the shore. (2/10/93 RT 90; 2/10/93 RT 142.) The location of the tanker at that time had been determined by parallel radar indexing, rather than by plotting fixes on the very small scale chart of the area aboard the HOUSTON. (Findings 55, JA 153.) The Captain had no reason to anticipate that the tanker would be anywhere near the stranding area until the whole chain of incidents occurred after the chain parted. While the HOUSTON was making her slow turn, she struck an undersea coral pinnacle on which she stranded at 2009, resulting in her constructive total loss. (Findings 83, JA 159.)

The District Court's Findings, Conclusions and Judgment. The district court resolved all the conflicts in the evidence in respondents' favor, including the sharp conflicts in the testimony of Exxon's and respondents' expert witnesses with respect to the quality of Captain Coyne's

seriously injured as he had initially appeared to be, Captain Coyne had to make his navigation choices based on the information he then had when the operator's condition was deemed life threatening.

navigation of the stricken tanker. (Findings 61; Conclusions 36-39, JA 155, 170-171.) It adhered to its prior rulings which excluded Exxon's evidence on its case-in-chief, and it concluded that Captain Coyne was extraordinarily negligent in ordering the final turn when he had not ordered fixes to be plotted and was unaware of the undersea coral pinnacle on which the vessel stranded. In reaching those conclusions, the district court relied on two admiralty presumptions drawn respectively from *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), and *The Louisiana*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866). (Conclusions 22-32, 44-45, JA 173-175.)¹⁶

The court denied all of Exxon's post-trial motions and entered partial final judgment against it for the loss of the tanker. (CR 667, 674; JA 200-204.)

¹⁶ *The Pennsylvania* rule is that when a master of a vessel violates a regulatory duty, he is presumptively at fault. Plotting fixes on a navigation chart is a regulatory duty (33 C.F.R. § 164.11(c)), but that navigation rule is not imposed when the master of a vessel is in perilous circumstances, as the regulations themselves recognize. Both vessels in *The Pennsylvania* were at fault, and the court divided damages equally although the fault of one was presumed and the fault of the other was proved. *The Pennsylvania*, 86 U.S. at 138.

In *The Louisiana*, the Court decided that a moving vessel is deemed to be at fault when she strikes a stationary vessel or a fixed structure.

Nothing in either case suggests that the presumed fault is more than ordinary negligence. Here defense experts opined that the Captain made navigational mistakes; apparently the court concluded that several misjudgments and presumptive fault added up to extraordinary negligence.

Appeal. Exxon argued that the bifurcation order, the trial orders pursuant thereto, and the ultimate judgment deprived it of procedural due process of law because admiralty law does not permit either liability for breach of warranty or for tort to be determined by confining the trial solely to the conduct of the plaintiff when the defendants' misconduct is a substantial factor in causing injury. Exxon also contended that negligence of a plaintiff is not a defense to liability for breach of express or implied admiralty warranties; it is relevant only to the assessment of damages – an issue the court refused to try. *E.g.*, *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 321, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964).

Exxon also contended that this Court has not specifically written superseding cause into general maritime law and that the doctrine, as applied below, was in conflict with the comparative fault requirement of *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975), in conflict with the Eleventh Circuit's decision in *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985) (neither common law superseding cause nor last clear chance survived comparative fault established by *Reliable Transfer*), and irreconcilable with liability based on breaches of admiralty warranties, which sound in contract, not tort.

The Ninth Circuit's Opinion. The lower court affirmed, rejecting all of Exxon's contentions. (JA 209-233.) The court held that the doctrine of superseding cause applies to exonerate admiralty defendants from all liability for breach of warranty, strict liability in tort and negligence even when defendants have conceded that their acts and omissions were substantial factors in causing the marine

casualties. The court held that the district court correctly concluded that the Captain's negligence was the sole legal cause of the stranding and that its interpretation of superseding cause was not in conflict with *Reliable Transfer*. The court disregarded Exxon's contention that negligence of a plaintiff in a breach of warranty case is relevant only to apportionment of damages. (JA 223.)

The opinion recognized the conflict among the circuits on the question whether the superseding cause doctrine survived *Reliable Transfer* in maritime tort actions.¹⁷ (JA 219-223.) The court held that there was no need to compare fault because the doctrine, as interpreted and applied by it, is a complete defense to all of Exxon's claims for relief. It rejected Exxon's due process attack on the ground that excluding Exxon's evidence on its case-in-chief was within the district court's discretion. (JA 223-226.)

Petition for Rehearing. Exxon called the court's attention to factual errors and to misstatements of Exxon's arguments in the opinion.¹⁸ The Petition for

¹⁷ Compare *Hercules, Inc.*, 765 F.2d 1069, 1075 (intervening negligence did not survive *Reliable Transfer*) with *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992) and *Lone Star Indus. Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991) (disagreeing with the Eleventh Circuit on that point). *Hunley v. ACE Maritime Corp.*, 927 F.2d 493, 497, 498 (9th Cir. 1991) (applying superseding cause doctrine in a maritime tort case).

¹⁸ E.g., the opinion states: "Because it maintains the issues of causation, from breakout to grounding, are inseverable, Exxon avers that it was unfairly prejudiced by bifurcation. We do not agree." [Emphasis added.] (JA 224.) Instead, Exxon had argued

Rehearing was denied without correcting the errors. (CP App. B.)

SUMMARY OF THE ARGUMENT

1. The judgment which exonerated respondents from all liability in tort for their misconduct because Captain Coyne was found negligent violates *Reliable Transfer's* comparative fault rule. That rule was adopted to promote fairness and to deter wrongful behavior that is most likely to harm others. When admiralty defendants' faults are causes-in-fact of a marine casualty and a shipowner is also negligent, damages for the loss are divided among the parties on the basis of the proportionate fault of each. *City of Milwaukee v. Cement Div. Nat'l Gypsum Co.*, 515 U.S. ___, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995); *Reliable Transfer*, 421 U.S. at 410.

that legal cause of the stranding depended on the nature and extent of respondents' contractual duties and duties of care imposed upon them by admiralty law, all of which were breached before the breakout and that the hazards created by those breaches could not be severed from the events thereafter without denying Exxon the fair trial that the Due Process Clause guarantees. *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L.Ed. 1188 (1931) and its spawn.

The opinion also states: "Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects." JA 225, n.6. The statement is contradicted by the record and even by respondents' concession of fault. Exxon did not challenge on appeal the district court's findings on conflicting evidence that respondents were not negligent after the breakout because it would have been futile.

To encourage the district court to bifurcate liability, respondents admitted that the SPM's failure was a substantial factor in the tanker's loss, but none admitted any individual responsibility for that failure. Respondents persuaded the lower courts that liability could be determined without ever permitting Exxon to introduce its evidence of each of the respondents' serious breaches of admiralty duties before the breakout. If it had not been foreclosed, Exxon's evidence would have vividly demonstrated that loss of the tanker was one of the foreseeable hazards of respondents' wrongdoings and that Captain Coyne's fault, when compared with respondents' egregious wrongdoings, was minimal. The foreclosure orders and judgment disabled the court from apportioning fault as required by *Reliable Transfer* and violated this Court's admiralty policies by eliminating the deterrent effect of the comparative fault rule and inequitably imposing the whole loss on Exxon.

Even if this Court had explicitly incorporated common-law superseding cause into general maritime tort law (and it has not) and if the sole claim of respondents' wrongdoing had been negligence (and it was not), the respondents could not properly have been relieved from liability. Because respondents' misconduct foreseeably increased the risk of stranding and was a substantial factor in causing the loss, Captain Coyne's negligence could not have been a superseding cause of the casualty, as the Second Circuit has correctly held. *Petition of Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), cert. denied sub nom. *Continental Grain Co. v. City of Buffalo*, 380 U.S. 944 (1965). Accord, *Restatement (Second) of Torts*, § 442B (1965). Under *Reliable Transfer*, the only effect of

the Captain's negligence was to reduce proportionately the amount of damages to which Exxon was entitled. Although the Ninth Circuit has called its rationale "superseding cause", it has resuscitated contributory negligence as a complete defense to an admiralty tort. This Court abrogated that defense more than a hundred years ago. *The Max Morris*, 137 U.S. 1, 14-15, 11 S. Ct. 29, 34 L.Ed. 586 (1890).

Respondents forged the links in the liability chain before the HOUSTON left the mainland because the defects in the SPM and its allied equipment and the dangerous condition of the cargo hoses existed at that time. This case was tried and decided as if respondents' multiple breaches of admiralty duty before the breakout were irrelevant to liability. *Reliable Transfer* requires that all the faults of all the parties must be compared regardless of the particular order in which the faults occurred.

The district court's orders and ultimate judgment preventing Exxon from ever proving its liability case-in-chief not only violated this Court's admiralty policies, it also deprived Exxon of procedural due process of law.

Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 500, 51 S. Ct. 513, 75 L.Ed. 1188 (1931) states the basic principle for deciding whether a claim or an issue can be separately tried without infringing procedural due process. The issue must be so distinct and separable that trial of it alone may be had without injustice. Captain Coyne's conduct after the breakout could not be severed from the respondents' breaches of warranty and breaches of admiralty duty before the breakout because these events were a continuum that was unbroken by any

unforeseeable force. By splitting causation in two and foreclosing Exxon from ever proving respondents' misconduct before the breakout, the district court severed the unseverable and deprived Exxon of procedural due process of law.

2. Exonerating respondents from liability for breach of express and implied warranties because Exxon's Captain was negligent violates admiralty policy established by this Court in *Italia Societa*. That policy imposes liability on the party best situated to adopt preventive measures to reduce the likelihood of injury. Respondents, not Exxon and its tanker Captain, had control over all of the equipment furnished to Exxon. Respondents were the *only* persons who were situated to take preventive measures to reduce the likelihood of grounding caused by the dangerous mooring and the ultrahazardous equipment furnished to Exxon. The decision below destroys the deterrent effect of this Court's admiralty policies.

Breach of warranty sounds in contract, not tort. Negligence of a shipowner in whose favor warranties run may reduce damages for which warrantor is liable, but it does not defeat liability. *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), *cert. denied sub. nom. Yacimientos Petroliferos Fiscales v. Paragon Oil Co.*, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963). *Cf. Restatement (Second) of Contracts* § 350 (1981).

ARGUMENT

I. THE APPLICATION OF COMMON-LAW SUPERSEDING CAUSE TO RELIEVE RESPONDENTS FROM ALL LIABILITY IN TORT FOR THEIR WRONGDOING IS IRRECONCILABLE WITH RELIABLE TRANSFER

This Court has applied common-law principles in admiralty cases when they are well suited to the maritime context without the "conceptual distinctions" which are "foreign to [admiralty] traditions of simplicity and practicality." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631, 79 S. Ct. 406, 3 L.Ed.2d 550 (1959). Any doubts that may have existed about the impact of a shipowner's intervening negligence on defendants' admiralty liability in tort for their breaches of duty that were substantial factors in a casualty should have been put to rest by *Reliable Transfer*.¹⁹ In *Reliable Transfer* itself, the captain of the plaintiff's tanker was 75 percent at fault for the tanker's grounding, but his gross negligence did not defeat liability of the Coast Guard for negligently failing to maintain a light. Instead, the Court required the loss to be borne proportionately to the fault of each. *Reliable Transfer*, 421 U.S. at 410.

¹⁹ As G. Gilmore observed before *Reliable Transfer*, "the maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party." G. Gilmore, C. Black, *The Law of Admiralty* § 7-5, at 494 (2d ed. 1975).

The adoption of comparative fault was based not only on the Court's concern for fairness,²⁰ but also on imposing "the strongest deterrent upon the wrongful behavior that is most likely to harm others." 421 U.S. at 405, n.11.²¹

The Court reaffirmed the same principle in *City of Milwaukee v. Cement Div. Nat'l Gypsum Co.*, 515 U.S. ___, 115 S. Ct. 2091, 2097, 132 L.Ed.2d 148 (1995) (*Reliable Transfer* required " 'that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made' " (quoting *McDermott, Inc. v. AmClyde*, 511 U.S. ___, ___, 114 S. Ct. 1461, 1462, 128 L.Ed.2d 148 (1994))).

²⁰ As the Court's discussion of *Reliable Transfer* was explained in *McDermott, Inc. v. AmClyde*, 511 U.S. ___, ___, 114 S. Ct. 1461 [128 L.Ed. at 156] (1994), the old damages rule was " 'inequitable.' " "Thus the interest in certainty and simplicity served by the old [divided damages] rule was outweighed by the interest in fairness promoted by the proportionate fault rule." *Ibid.*

"That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *Reliable Transfer*, 421 U.S. at 406.

²¹ Respondents acknowledged the correct admiralty principle in their responding brief for the Ninth Circuit: "[H]aving established, as a matter of fact, that the injury would not have occurred but for the defendants' conduct, plaintiff must persuade the court, that, as a matter of policy, defendant should be held legally responsible for his injury." Respondents'/Appellees' Joint Brief at 29-30. Respondents failed to recognize that this Court's admiralty policy imposes responsibility for the loss of the HOUSTON squarely upon them because they, not Exxon or the tanker's captain, were best situated to take the necessary safety measures to prevent breakaways and strandings.

Thus, in *City of Milwaukee*, *supra*, 515 U.S. ___, 115 S. Ct. 2091, 2097, 132 L.Ed.2d 148 (1995) the shipowner brought its admiralty action against the City for the loss of its vessel which had broken away from the City's mooring in a storm and sank. The shipowner alleged that the City had breached its duty as a wharfinger by assigning the vessel to a berthing known to be unsafe in heavy winds and in failing adequately to warn of hidden dangers in the slip. The City contended that the shipowner was negligent because its master left the ship virtually unmanned in the winter without personnel aboard who could monitor the weather conditions or who could summon help. The district court held that the shipowner was 96 percent at fault for the loss, and it denied prejudgment interest. The appellate court modified the judgment by reducing the shipowner's fault to 75 percent, and it awarded prejudgment interest to the shipowner. This Court affirmed. After *Reliable Transfer*, marine losses are shared on the basis of proportionate fault. The shipowner's recovery had been reduced by two-thirds by reason of its own negligence, but the City was still required to pay its fair share of the loss.

The City's responsibility for the remaining one-third is no different than if it had performed the same negligent acts and the owner, instead of also being negligent, had engaged in heroic maneuvers that avoided two-thirds of the damages. The City is merely required to compensate the owner for the loss for which the City is responsible.

515 U.S. at ___, [115 S. Ct. at 2097].

In our case, Captain Coyne and the crew of the HOUSTON performed heroically in trying to rescue the vessel and her seamen from the constant perils in which respondents' misconduct placed them. In the last few minutes, they were unable to save the ship or to prevent injury to the crane operator, but the Captain's misjudgments did not relieve respondents from having to compensate Exxon for their proportionate share of the loss.

A. The Decision Below Violated the Admiralty Policies Established by *Reliable Transfer*

Neither Exxon nor Captain Coyne had any control over the SPM and its allied equipment that threatened grounding and oil spills for every tanker moored at the facility. The HIRI respondents had actual knowledge that SPM failures were inevitable and that they had taken none of the safety precautions that their own experts had advised them to adopt. If Exxon had been permitted to try its case-in-chief, it could have presented evidence that the other respondents were chargeable with knowledge of the dangerous condition of the equipment. The respondents were unquestionably best situated to undertake safety measures to prevent breakaways and groundings. By exonerating all of the respondents from liability for the tanker's loss, the Ninth Circuit removed the deterrent effect that this Court intended to impose by adopting comparative fault.

Blaming Captain Coyne for loss of the tanker is manifestly unjust. He and the crew of the HOUSTON were valiantly dealing with a whole succession of emergencies, all of which were created by respondents' breaches of

duties, plus adverse winds, ocean currents, and darkness. The HOUSTON would have been nowhere near the stranding point but for the parting of the defective chafe chain, the lack of safety devices on the HIRI's cargo hoses, the absence of adequate tug assistance, and the inadequate training of HIRI's mooring masters. Relieving respondents from all liability for the casualty is as unfair as it would be to exonerate a defendant who had negligently set a moored tanker afire because the crew were not as adept in controlling the blaze as the defendant's expert witnesses testified they should have been.

B. The Decision Below Violated *Reliable Transfer's* Requirement that all of Defendants' Faults Must Be Compared with the Plaintiffs' Faults in Assigning Responsibility for a Marine Casualty

The Ninth Circuit decided this case as if the only relevant evidence of liability were the occurrences after the breakout although grounding was one of the hazards that their pre-breakout conduct created. Because the district court had foreclosed all of Exxon's evidence that would have established respondents' tortious pre-breakout acts and omissions, it could not compare degrees of fault as *Reliable Transfer* requires. All the faults of each of the respondents had to be compared with all the faults attributed to Captain Coyne irrespective of the order in which the faults occurred. That comparison would have shown that the degree of Captain Coyne's fault was slight as compared with the degrees of respondents' faults.

That defect could not be cured by respondents' admission that the SPM's failure was a cause-in-fact of

the grounding. None of the respondents admitted any individual responsibility for the failure, and the foreclosure of Exxon's evidence prevented the district court from comparing the relative degrees of faults among the respondents and likewise prevented a comparison of respondents' faults with those attributed to Captain Coyne. For example, temperatures of a group of human beings cannot be adequately compared with one another when the temperature of one party is precisely recorded on a thermometer as 102 degrees, but the temperature of all the others is recorded collectively on a device that is capable only of registering "hot" or "cold."

The Eleventh Circuit in *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), correctly applied the comparative fault rule and rejected the superseding cause doctrine in a case in which a stevedoring company tried to escape liability for negligently loading the plaintiff's barge. The barge had capsized, losing most of the cargo and damaging the barge. The stevedoring company argued that it should be relieved of liability because the barge was unseaworthy and because the barge owner and the company towing the vessel were negligent. Following *Reliable Transfer*, the court apportioned responsibility for the casualties. 765 F.2d at 1075. After pointing out that the common law doctrines of last clear chance and intervening negligence did not hold sway even under the old divided damages rule, the court held that the stevedore could not use either of those concepts to circumvent *Reliable Transfer*:

"Unless it can truly be said that one party's negligence did not in any way contribute to the

loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases."

765 F.2d at 1075.

C. Respondents could not Escape Liability even if Superseding Cause had been Incorporated into General Admiralty Law

After respondents conceded that their collective conduct was a cause-in-fact of injury, causation was no longer in issue. The remaining liability question was whether the risk of stranding was a hazard that was or should have been foreseen by respondents. "Superseding cause" is an expression of common law policy to limit a defendant's liability when a natural or human force has intervened under circumstances that are so extraordinary and remote from the risks that the defendant's earlier negligence has created that the law deems it unjust to hold him responsible for the ensuing harm. The hazards of grounding and navigational misjudgments were foreseeable risks created by the respondents' many breaches of admiralty duties owed to Exxon, and, therefore the superseding cause doctrine was inapplicable.

Restatement (Second) of Torts Section 442B (1965) states the applicable blackletter principle:

Where the negligent conduct of the actor [respondents] creates or increases the risks of a particular harm [stranding] and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of

liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Comment b to Section 442B explains:

[A]ny harm which is itself foreseeable [as stranding was in this case], as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct.

The Second and Fifth Circuits have correctly concluded that a plaintiff's negligence does not become a superseding cause of a marine injury when the harm that occurred was within the hazards created by the defendant's breaches of duty and were or should have been foreseen by them.

In *Kinsman Transit Co.*, 338 F.2d at 711-13, a wharfinger's defective mooring device failed during a heavy storm causing a vessel to break away from the mooring. The shipowner's negligence in leaving the vessel unmanned during the storm did not relieve the wharfinger from liability for the ensuing chain of events that damaged the breakaway vessel, other vessels, and contributed to the collapse of a city bridge. *Kinsman Transit Co.*, 338 F.2d at 723-26. As Judge Friendly held in *Kinsman Transit Co.*:

It was indeed foreseeable that improper construction . . . of the "deadman" [the mooring device] might cause a ship to break loose and damage persons and property on or near the

river. . . . [A] prudent man . . . would have realized that the danger of this would be the greatest under such water conditions as developed during the night [of the casualties].

338 F.2d at 723.

The fact that the wharfinger in *Kinsman Transit Co.* did not actually foresee that the captain of the first vessel set adrift would be negligent or that the calamitous chain of events would thereafter occur did not relieve the wharfinger of liability:

[W]e would find it difficult to understand why [the wharfinger] failed to use the care required to provide for the light of expectable forces . . . when the very risks that [his] negligent conduct produced other consequences to such persons . . . were fairly foreseeable when he fell short of what the law demanded.

338 F.2d at 723-24.²²

Among the risks that respondents were required to foresee was that Captain Coyne might not navigate the imperiled tanker as carefully as respondents' armchair experts testified he should when they were navigating in a quiet courtroom. The Second and Fifth Circuits have consistently recognized that when the master of a vessel is put in the center of destructive forces, as was Captain

²² *Accord*, *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970) (defendant was not relieved of liability to a shipyard worker injured by a hoist failure where defendant did not actually foresee the harm nor the manner in which injury occurred because the injury was within the risks created by a defective weld in the hoist furnished by defendant).

Coyne, and he must make hard choices among competing courses of action, admiralty law requires that there must be something more than mistakes of judgment by the master to find that he was negligent, let alone extraordinarily negligent, when it turns out that his choices were wrong. *E.g.*, *Employers Ins. of Wausau v. Suwanne River Spa Lines, Inc.*, 866 F.2d 752, 772-73 (5th Cir.), *cert. denied sub nom. Employers Ins. of Wausau v. Avondale Shipyards*, 493 U.S. 820 (1989); *The Gulfstar*, 136 F.2d 461, 465 (3d Cir. 1943); *The Imoan*, 67 F.2d 603, 605 (2d Cir. 1933). Ordinary negligence does not become extraordinary, unforeseeable negligence because a plaintiff makes several mistakes instead of only one.

The Ninth Circuit's conclusion that the Captain's negligence was the "sole" cause of the stranding is inconsistent with the respondents' admission that their own conduct was a cause-in-fact of the casualty. Exoneration of all the respondents from any liability cannot be reconciled with the common-law principle upon which it purports to rely, with the comparative fault rule of *Reliable Transfer*, and with the admiralty policies that caused the court to adopt that rule.

What the Ninth Circuit has actually done is to resurrect contributory negligence as a complete defense to liability for maritime negligence and strict products liability by dubbing the defense "superseding cause." This Court buried that defense over a hundred years ago in *The Max Morris*, 137 U.S. 1. It is of great importance to domestic and international commercial shipping that this Court clearly stated that the Second and Fifth Circuits have correctly applied general admiralty law.

D. The District Court's Foreclosing Exxon from Ever Proving its Case-in-Chief Deprived it of Due Process of Law

Gasoline Products, Inc., 283 U.S. at 500 stated the basic principle for deciding whether any issue can be separately tried without infringing procedural due process: the issue must be so "distinct and separable from the others that a trial of it alone may be had without injustice."²³ Captain Coyne's conduct *after* the breakout could not be separated from respondents' breaches of warranty and breaches of admiralty duties *before* the breakout that continued to endanger the tanker, the NENE, and the crews of both. Respondents' prior acts and omissions and the Captain's responses to the hazards thereby created formed a continuous chain of events, unbroken by any unforeseeable force. By foreclosing Exxon from proving its case-in-chief, the district court *did* sever the unseverable and, with the Ninth Circuit's approval of that surgery, Exxon was deprived of procedural due process of law guaranteed it by the Fifth Amendment.

²³ Even when the issue is subject matter federal jurisdiction, that issue cannot be tried alone when it is factually interwoven with the merits of the case. *E.g.*, *Smith v. Sperling*, 354 U.S. 91, 95, 77 S. Ct. 1112, 1 L.Ed.2d 1205 (1957).

II. THE NINTH CIRCUIT'S EXONERATION OF RESPONDENTS FROM ALL LIABILITY FOR BREACHES OF EXPRESS AND IMPLIED ADMIRALTY WARRANTIES IS CONTRARY TO ADMIRALTY POLICY ESTABLISHED BY *ITALIA SOCIETA*

A. The Ninth Circuit Opinion is Irreconcilable with *Italia Societa*

The HIRI respondents expressly warranted the safety of the berth and impliedly warranted the safety of their allied equipment, including their cargo hoses; the remaining respondents, respectively, impliedly warranted the safety of the SPM's design and the safety of the chafe chain that failed.

Before the HOUSTON left the mainland, the HIRI respondents had breached the safe berth warranty because, as Exxon offered to prove, the HIRI respondents had actual knowledge (and Exxon did not) that their experts had warned them that SPM failures were inevitable, that their cargo hoses (without quick-release devices) were dangerous and created the hazards of grounding and oil spills for every tanker that moored at the SPM unless the recommended safety measures were undertaken. The HIRI respondents also had actual knowledge (and Exxon did not) that two tankers had earlier broken away from the SPM, that they had no tugs sufficiently powerful to aid a tanker that had broken away, that Coast Guard assistance was more than two hours away, and that their mooring masters had received no training to help a tanker that was cast adrift. By its bifurcation orders, its later exclusionary rulings and its judgment, the

district court foreclosed Exxon from ever introducing its abundant evidence on those points.

In actions for breach of maritime warranties, *Italia Societa* establishes the policy of placing the risks of loss on the persons who are best situated to prevent injuries. In that case the shipowner's negligence did not defeat liability for breach of an implied admiralty warranty when a seaman was injured by a latent defect in equipment furnished by the stevedore because the stevedore was in a better position than the shipowner to undertake safety measures to reduce the likelihood of such injuries:

[L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

376 U.S. at 324.

Neither Exxon nor Captain Coyne had any control over the respondents' dangerous equipment or the HIRI respondents' failure to take any of the recommended safety measures. To exonerate respondents from all liability for breach of warranty because the district court found that Captain Coyne was thereafter negligent is directly contrary to the policy adopted in *Italia Societa*. Negligence of a shipowner, in whose favor the warranty runs, may reduce the damages for which the warrantor is liable to the extent that such negligence constitutes a failure to mitigate damages; it does not defeat liability for breach of contract.

B. The Ninth Circuit's Opinion is Contrary to Other Circuits

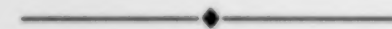
Other circuits have correctly held that warrantors of safe berth are required to anticipate all reasonably foreseeable dangers created by the combination of the force of tides, winds and seas, as well as negligent seamanship. E.g., *Eastern Massachusetts Street Ry. Co. v. Transmarine Corp.*, 42 F.2d 58, 62 (1st Cir.), cert. denied, 282 U.S. 883 (1930).

As Judge Friendly explained in *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), cert. denied sub nom. *Yacimientos Petroliferos v. Paragon Oil Co.*, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963): A warrantor of safe berth may "lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damage. . . . [T]his is an issue on which defendant has the burden." A plaintiff's contributory negligence is irrelevant to liability based on breach of an admiralty contract. *International Ore & Fertilizer Corp. v. S.G.S. Control Servs. Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994).

When a safe berth warranty has been breached, as it was here, the shipowner can recover damages for his loss, excluding only those damages that he could have avoided by taking reasonable steps to mitigate his loss. Cf. *Restatement (Second) of Contracts* § 350, pp. 126, et seq. (1981). When a plaintiff has tried to mitigate his damages and has been unsuccessful, he may nevertheless recover the full amount of his loss from the defendant. *Ibid.*

Merchant shippers and their crews must rely on wharfingers, stevedores, and others to supply them with reasonably safe moorings and facilities over which the shipowners and their captains have no control. Admiralty warranties are taken very seriously in commercial shipping because shipowners (and charterers) need the assurance of indemnification that admiralty warranties have been previously well understood to provide. If these warranties are uniformly enforced to require indemnification of shipowners and charterers when the moorings are unsafe, they provide a strong impetus to make berths safe. Those are the very concerns that were expressed by this Court in *Italia Societa* and *Reliable Transfer* which were disregarded by the Ninth Circuit.

Shipowners and seafarers must also be able to rely on uniform enforcement of warranties whether their vessels moor in Hawaii, Louisiana or New York. With the decision of the Ninth Circuit in this case, that uniformity is absent.



CONCLUSION

For the reasons hereinabove stated, Exxon prays that the judgment be reversed and that it be awarded its costs.

Dated: January 3, 1996.

Respectfully submitted,

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